No. 05-631

IN THE SUPREME COURT OF THE UNITED STATES

ENVIRONMENTAL DEFENSE and
NATIONAL WILDLIFE FEDERATION,

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

JOINT BRIEF OF THE STATE OF MISSOURI, THE STATE OF NEBRASKA, AND THE NEBRASKA PUBLIC POWER DISTRICT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a reviewing court uphold an agency decision when the agency's rationale is supported by the administrative record, notwithstanding the existence of information in the record that does not support the agency's ultimate decision?

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INTRODUCTION

Pursuant to Supreme Court Rule 15, the State of Missouri, the State of Nebraska, and the Nebraska Public Power District (together, the "Joint Respondents") submit this brief in opposition to the Petition for Writ of Certiorari filed by Environmental Defense and the National Wildlife Federation (together, the "Petitioners").

The Petitioners ask this Court to review the United States Court of Appeals for the Eighth Circuit's application of the Administrative Procedure Act's ("APA") judicial review provision, 5 U.S.C. § 706(2)(A). The Petition is based on a mischaracterization of the agencies' reasoning and a selective reading of the Court of Appeals' application of the appropriate standard of review. The Court of Appeals properly applied the correct standard, and further review is unwarranted. At its heart, the Petition is about the Petitioner's dissatisfaction with the substantive outcome of their case, which they want this Court to review *de novo*.

STATEMENT OF THE CASE

In 1944, Congress explained: "The water of the Missouri River system is a primary national resource which, up to the present time, has been inadequately controlled and developed." S. Doc. No. 191, 78th Cong., 2d Sess. (1944) at 10. To effectuate that goal, Congress enacted the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (1944), authorizing the construction and operation of dams and reservoirs on the main stem of the Missouri River. Congress made flood control and navigation the "dominant function" for which the Secretary of War was to manage reservoirs operated by the U.S. Army Corps of Engineers ("Corps"). *See ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 512, 108 S. Ct. 805, 815 (1988); *see also South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003), *cert. denied*, *North Dakota v. Ubbelohde*, 514 U.S. 987, 124 S. Ct. 2015 (2004). Secondary project purposes include water supply, power generation, irrigation, recreation and fish and wildlife. *E.g.*, S. Doc. No. 247, 78th Cong., 2nd Sess. (1944) at 3; *Ubbelohde*, 330 F.3d at 1019-20.

In furtherance of its mission to control flooding and promote navigation on the Missouri River, the Corps eliminates destructive flood flows and provides supplemental water to downstream States in low flow periods. *See* S. Doc. No. 191 at 17-18 ("This basin-wide plan provides for a number of reservoirs . . . for the purpose of storing water, and releasing it during periods of low flow.") Vast infrastructure has developed in reliance on that stable flow pattern. The National Academy of Sciences, for example, highlighted the importance of the Missouri River as a source of supply for municipal and industrial uses. National Academy Press, *The Missouri River Ecosystem: Exploring the Prospects for Recovery* (2002). The water supply benefits of the Missouri River "accrue at intakes for thermal power plants and at municipal, irrigation, commercial/industrial, domestic, and public water intakes so long as daily flows exceed minimum elevation requirements for water intakes." *Id.* at 93. In 1994, for instance, the Corps found $571.6 million in annual benefits (i.e., cost savings) from the withdrawal of water from the Missouri River. *Id*. Hydropower benefits, measured by the costs of alternative supplies, have an annualized value of $615 million. *Id*. at 97. The Missouri River system also produced an estimated $18 billion in total flood damage prevented as of 1998. *Id*. at 99. All of the states on the Missouri River system share in these benefits.

To carry out its mission, the Corps adopted regulations in accordance with Section 7 of the Flood Control Act, now codified at 33 U.S.C. § 709, requiring the establishment of "water control plans" for all Corps projects, and the preparation of "master manuals" where several projects within a drainage have interrelated purposes. 33 C.F.R. § 222.5(a) & (i)(2). The Corps adopted the Missouri River Main Stem Reservoir System Reservoir Regulation Manual ("Master Manual") in 1960. The Corps revised the Master Manual in 1975, 1979, and most recently in 2004. The Master Manual presents the regulatory framework by which the Corps attempts to achieve the multiple purposes for which the dam and reservoir system was created. *In re Operation of the Missouri River System Litigation*, 421 F.3d 618, 625 (8th Cir. 2005) (Petition Appendix ("Pet. App.") at 4a).

In November 2000, the U.S. Fish and Wildlife Service ("FWS") issued a biological opinion (the "2000 BiOp") concluding that the Corps' operations under the 1979 Master Manual would violate the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544 by jeopardizing ESA-listed species (the least tern, piping plover and pallid sturgeon) and adversely modifying designated critical habitat for the tern and plover.[1] Accordingly, FWS developed a "reasonable and prudent alternative" ("RPA") designed to avoid a violation of the ESA. *See* 50 C.F.R. § 402.02; 402.14(g)(5). One requirement of the RPA was a reduction in releases from Gavins Point Dam (the dam farthest downstream on the Missouri River) to 21,000 cubic feet per second ("cfs"). 421 F.3d at 625-26 & n.5 (Pet. App. at 5a-6a). This is the requirement the Petitioners contend must be implemented and that the Petitioners would have the lower courts mandate if successful in this litigation. Petition at 7-9.

To enforce this requirement, on February 13, 2003, Petitioners, then led by American Rivers (absent from the Petition), sought and obtained an injunction from the United States District Court for the District of Columbia requiring the Corps to comply with the 2000 BiOp and its RPA. 421 F.3d at 626-27 (Pet. App. at 7a). On motion by the State of Nebraska, that case and five other pending cases related to the operation of the Missouri River System were subsequently consolidated by the Judicial Panel on Multidistrict Litigation in the United States District Court for the District of Minnesota. *In re Operation of the Missouri River System Litigation*, 277 F. Supp. 2d 1378 (J.P.M.L. 2003).

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[1]The United States District Court for the District of Nebraska vacated and set aside in part FWS' *Designation of Critical Habitat for the Northern Great Plains Breeding Population of the Piping Plover; Final Rule*, 67 Fed. Reg. 57,638 (Sept. 11, 2002), and at this time no such habitat exists "in Nebraska and on the Missouri River adjacent to Nebraska." *Nebraska Habitat Conservation Coalition v. U.S. Fish and Wildlife Service*, 4:03CV059 (D. Neb.) (Mem. Op. filed Oct. 13, 2005).

In late 2003, after consolidation, the Corps presented FWS with a revised biological assessment[2] reflecting new information regarding the listed species' status and correcting certain misconceptions held by FWS regarding the hydrodynamics and geomorphology of the Missouri River. 421 F.3d at 627 (Pet. App. at 8a). Among the new information was data demonstrating that tern and plover populations had increased since 2000, despite the absence of the flow modifications called for in the 2000 BiOp, and that those flow alterations "actually impeded the development of the habitat those species require." *In re Operation of the Missouri River System Litigation*, 363 F. Supp. 2d 1145, 1157 (D. Minn. 2004), *aff'd in part and vacated in part*, 421 F.3d 618 (8th Cir. 2005) (Pet. App. at 43a). Based in part on that new data, the Corps requested that the flow-related elements of the 2000 BiOp be revised. The Corps, however, reiterated its commitment to implement all other elements of the 2000 BiOp. JA IX:06627.[3]

The Corps and FWS completed a new Section 7 consultation based on that information, and FWS revised the 2000 BiOp. The amended opinion ("Amended BiOp") was issued on December 16, 2003, while motions for summary judgment challenging the validity of its predecessor were pending in the district court. Shortly thereafter, pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321-4370e, the Corps issued its Final Environmental Impact Statement ("FEIS") and completed revisions to its Master Manual consistent with the goals of the Amended BiOp. On March 19, 2004, the Corps issued a Record of Decision ("ROD") formally adopting its revised 2004 Master Manual. 363 F. Supp. 2d at 1152 (Pet. App. at 33a).

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[2]A biological assessment is the document most often used to initiate formal consultation under Section 7 of the ESA. 50 C.F.R. § 402.14.

[3]"JA" refers to the Joint Appendix filed in the Eighth Circuit. The Roman numeral refers to the volume, which is followed by the consecutive page number in the appendix.

The Amended BiOp modified slightly the 2000 BiOp that formed the basis of the Petitioners' complaint. In part, the Amended BiOp allowed for releases of 25,000 cfs rather than 21,000 cfs during the critical summer months.[4] The Amended BiOp also allowed the Corps to release water in excess of such amounts if the Corps accelerated its plan for habitat augmentation by acquiring 1,200 acres of shallow water habitat for the pallid sturgeon by July 1, 2004, which the Corps did.[5] The Amended BiOp retained the requirement that the Corps implement a "spring rise," along with nearly all of the other provisions of the 2000 BiOp, including, but not limited to implementation of an adaptive management program, flow enhancement efforts, mechanical habitat construction, and species propagation and augmentation.[6] The Corps currently is implementing the amended RPA, which spans 60 pages and represents a comprehensive plan to avoid jeopardizing the Missouri River species. JA IX:06797-856.

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[4]It was undisputed that flows of 21,000 cfs would be insufficient to maintain minimum navigation service and downstream water supply uses, including thermal power generation, J.A. XI:08338.

[5]Petitioners, again then lead by American Rivers, attempted to bring a separate challenge against this provision and the Corps' compliance with it. The district court dismissed and the group appealed. *American Rivers, Inc. v. U.S. Army Corps of Engineers*, 2004 WL 2905281 (D. Minn. Dec. 10, 2004). Ultimately, however, American Rivers and the Petitioners voluntarily dismissed their appeal.

[6]The Corps currently is in the process of developing the details of the "spring rise" having recently completed a public process involving the Missouri River stakeholders. A description of the proposed plan is available on the Corps of Engineers' Northwest District website at http://www.nwd-mr.usace.army.mil/rcc/reports/pdfs/TechCriteria2006DraftAOP.pdf.

After the Amended BiOp, FEIS, and ROD were issued, various parties in the consolidated litigation filed motions for summary judgment. The Petitioners challenged FWS' modification of the 2000 BiOp, claiming it violated the ESA on substantive grounds. The District Court carefully addressed and rejected each of the Petitioners' substantive arguments. 363 F. Supp. 2d at 1156-60 (Pet. App. at 41a-49a). Petitioners also argued that the FEIS did not provide an adequate explanation for the selection of the Corps' preferred alternative over the alternative preferred by Petitioners. In rejecting that argument, the court stated:

> American Rivers fails to demonstrate why the detailed analyses and comparisons included in Chapter Seven of the Final EIS are insufficient under NEPA. The Court thus finds that the Corps' decision to implement the [Corps' preferred alternative] was made in good faith after proper consideration of the alternatives, and is therefore reasonable and complies with NEPA.

Id. at 1168 (Pet. App. at 62a-63a).

On appeal to the Eighth Circuit, Petitioners continued to make a number of substantive claims involving the Amended BiOp. In addition, Petitioners claimed that the conclusions in the Amended BiOp were contradicted by factual findings contained in the Amended BiOp. 421 F.3d at 633-36 (Pet. App. at 20a-25a). The court rejected these arguments, finding that the FWS had demonstrated a rational connection between the changes in circumstances since the 2000 BiOp was issued and the changes contained in the Amended BiOp. *Id*. at 635 (Pet. App. at 23a).

Regarding Petitioners' claim that the FEIS did not sufficiently explain the choice of the Corps' preferred alternative, the court stated:

> Contrary to what American Rivers seems to suggest, there is no further NEPA or Administrative Procedure Act requirement to repackage the

> information in the summary tables into prose one-to-one comparisons of the [Corps' preferred alternative] with each of the other alternatives. We conclude that the comparisons provided in the EIS "cogently explain why [the Corps] has exercised its discretion in a given manner." *Motor Vehicle Mfrs.*, 463 U.S. at 48, 103 S. Ct. 2856.

Id. at 637 (Pet. App. at 26a).

REASONS FOR DENYING THE PETITION

The Court of Appeals adopted the appropriate standard of review. It correctly applied that standard to the administrative record before it. Nothing in the court's analysis conflicts with the decisions of this Court or any other Circuit. Therefore, further review by this Court is unwarranted.

I. THE COURT OF APPEALS APPLIED THE STANDARD OF REVIEW ESTABLISHED BY THIS COURT.

This Court has articulated on numerous occasions the appropriate standard for review of an agency decision under 5 U.S.C. § 706(2). The scope of review is narrow, and a court may not substitute its judgment for the agency's. *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2866 (1983). The agency must provide an explanation for its decision that demonstrates a rational connection between the facts found and the decision made. *Id*. The court is then limited to deciding whether the decision was based on consideration of relevant factors and whether there has been a clear error of judgment. *Id*., 103 S. Ct. at 2866-67. The court must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id*., 103 S. Ct. at 2867 (quoting *Bowman Transportation, Inc. v Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 95 S. Ct. 438, 442 (1974)). In reviewing a decision, a court must make a "'searching and careful'" review of the administrative record. *Marsh v. Oregon Natural*

Resources Council, 490 U.S. 360, 378, 109 S. Ct. 1851, 1861 (1989) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S. Ct. 814, 823 (1971)). When the analysis requires a "'high level of technical expertise,'" the reviewing court must defer to the informed discretion of the responsible agency. *Id*. at 375, 109 S. Ct. at 1861 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412, 96 S. Ct. 2718, 2731 (1976)).

The Court of Appeals stated the applicable standard in a way that shows it was using the standard articulated by this Court:

> We review the actions of the Corps and FWS under the Administrative Procedure Act "to determine whether they are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Ubbelohde*, 330 F.3d at 1027 (quoting 5 U.S.C. § 706(2)(A)). An arbitrary and capricious action is one in which:
>
> > the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.
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> *Cent. S.D. Coop. Grazing Dist. v. Sec'y of the United States Dep't. of Agric.*, 266 F.3d 889, 894 (8th Cir.2001) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)). "If an agency's determination is supportable on any rational basis, we must uphold it." *Voyageurs Nat'l Park Ass'n*, 381 F.3d at 763. "When the resolution of the dispute involves primarily issues of fact and

> analysis of the relevant information 'requires a high level of technical expertise, we must defer to the informed discretion of the responsible federal agencies.'" *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1128 (8th Cir.1999) (quoting *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989)).

421 F.3d at 628 (note 6 omitted) (emphasis supplied) (Pet. App. at 10a).

The Petitioners assign error by lifting the underscored sentence from the larger context in which the Court of Appeals placed it. The Petitioners assert (unremarkably) that the APA does not allow a Court to "make up a rationale out of the record," Petition at 18-19, n. 10, and suggest that the Eighth Circuit fabricated a justification for the agencies' actions that the agencies themselves never offered. The Petition is based entirely on that premise, which is patently false.

The agencies' explanations are set forth in: 1) the Master Manual, ROD, and supporting FEIS; and 2) the Amended BiOp. Each of these documents was supported by a voluminous administrative record. The Court of Appeals conducted a searching and thorough review of the administrative record to determine whether the Master Manual, the FEIS, and the Amended BiOp were arbitrary and capricious. That is precisely what the APA and this Court require of a reviewing court. *See, e.g.*, *Marsh v. Oregon Natural Resources Council*, 490 U.S. at 378, 109 S. Ct. at 1861 (review under the APA is based on agency rationale and support for it in the record). *Accord* Petition at 18 (acknowledging same).

II. THE COURT OF APPEALS CORRECTLY APPLIED THE STANDARD TO THE FACTS OF THIS CASE.

The record in this case contains detailed explanations by the Corps and FWS supporting their decisions. A brief review of that

record establishes that the Court of Appeals correctly applied the appropriate standard to the record before it.[7]

A. The FEIS and ROD Set Forth the Corps' Rationale Both in Summary Form and in Detailed Analysis.

NEPA requires that the agency provide a detailed statement that will allow a reviewing court to determine whether the agency has made a good faith effort to consider the values NEPA protects. *Friends of the Boundary Waters Wilderness*, 164 F.3d at 1128. The statement must explain the agency's analysis. *Id*. However:

> We need not "fly speck" an EIS for inconsequential or technical deficiencies. Instead, we consider "whether the agency's actual balance of costs and benefits was arbitrary or clearly gave insufficient weight to environmental values."

Id. (quoting *Minnesota Public Interest Research Group v. Butz*, 541 F.2d 1292, 1300 (8th Cir 1976), *cert. denied*, 430 U.S. 922, 97 S. Ct. 1340, 51 L. Ed. 2d 601 (1977)) (other citations omitted). The court's only role is to make sure that the agency has considered the environmental impacts of its proposed actions. *Missouri Coalition for the Environment v. Corps of Engineers*, 866 F.2d 1025, 1032 (8th Cir.), *cert. denied*, 493 U.S. 820, 110 S. Ct. 76, 107 L. Ed. 2d 42 (1989).

The Petitioners assert that the Corps never explained why it selected its preferred alternative. To the contrary, the Corps first addressed the selection of the preferred alternative in the cover letter accompanying the FEIS, noting that the preferred alternative includes measures to conserve more water during droughts and varies levels in the reservoirs to benefit fish and wildlife. The Corps also noted

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[7]By filing this opposition, the Joint Respondents do not endorse all aspects of the ROD, FEIS, or Amended BiOp. The Joint Respondents contend only that the agencies' decisions are adequately supported.

the adoption of a comprehensive set of measures, the Missouri River Recovery Implementation Program ("MRRIP"), not technically part of the preferred alternative, which was "directed toward the recovery of Missouri River species provided protection under the ESA and the ecosystem on which they depend." JA X:07185.

Volume I, Part 1 of the FEIS, encompassing some 515 pages, provides an overview of the existing environment and the alternatives submitted to the Corps for consideration in developing the 2004 Master Manual. JA X:07127-642. Part 2, encompassing an additional 387 pages, addresses the various alternatives the Corps selected for detailed analysis and comparison. JA X:07643-0830.

In discussing the alternatives selected, the Corps identified a key component of any successful plan with so many competing interests - compromise:

> As the Corps embarked on its efforts to identify a preferred alternative . . . it was apparent that considerable controversy would surface if this alternative were the [2000] BiOp RPA. If acceptance of a Water Control Plan were to occur, the various basin interests would have to reach some form of compromise.

JA X:07645. In order to address these concerns, the Corps selected five alternative plans for detailed presentation: the modified conservation plan ("MCP"), which did not include the spring rise and summer low flow contained in the 2000 BiOp RPA, and four GP alternatives, so designated because they included the Gavins Point Dam releases recommended in the 2000 BiOp RPA at four different levels of spring rise and summer low flow. JA X:07646. All of Chapter 7 of the FEIS, 257 pages, presents a detailed analysis and comparison of the effects of the various plans in five categories: hydrology; sedimentation, erosion and ice processes; water quality; environmental effect; and economic effect. JA X:07660-917.

Chapter 8 addressed the selection of the preferred alternative and the effects of that alternative. In the Introduction to the chapter,

the Corps specifically addressed some factors that argued against selecting any of the GP alternatives. The Corps noted:

- A January 2002 National Academy of Sciences' National Research Council Report highlighted the need for an adaptive management approach and a lack of understanding of the factors that are limiting spawning and recruitment of the pallid sturgeon.

- Engineering analyses of the Gavins Point Dam spring release recommendations showed that they would not be effective in restoring habitat for the least tern or piping plover.

- Engineering analyses of summer low flow recommendations indicated they would not be effective in attaining additional shallow water habitat.

- The Corps' implementation of the MRRIP in conjunction with the preferred alternative, which the Corps believed would better address the needs of the threatened and endangered species.

JA X:07920-21. The Corps concluded:

> The rationale for selecting the [preferred alternative] is a composite of analyses, information briefings, technical expertise, and comments concerning the resources evaluated as part of the Study. The Corps believes that the [preferred alternative], when combined with the other measures under MRRIP, conserves more water in the upper three reservoirs during extended droughts, meets the needs of the ESA listed fish and wildlife species, is consistent with the Corps' responsibilities under environmental laws and Tribal trust responsibilities, and provides for the Congressionally authorized uses of the System.

JA X:07923. The basis of the Corps' decision is made clear in the FEIS, and the Corps is under no obligation to re-package its reasoning to make it easier for the Petitioners to discern.

The Petitioners argued that the FEIS was nonetheless deficient because it did not contain an express statement regarding why the FEIS selected the MCP rather than Petitioners' preferred alternative. Of course, this ignores the numerous statements of the Corps' rationale summarized briefly above. It also ignores, as the Court of Appeals noted, the extensive comparative data contained in the FEIS. The court stated: "We conclude that the comparisons provided in the [FEIS] 'cogently explain why [the Corps] has exercised its discretion in a given manner.'" 421 F.3d at 637 (quoting *Motor Vehicle Manufacturers Association*, 463 U.S. at 48, 103 S. Ct. at 2869) (Pet. App. at 22a).

The ROD provides additional explanation for the decision. In the ROD, the Corps' responsibilities under the ESA were expressly addressed and the new RPA requirements contained in the Amended BiOp directly related to the Master Manual were adopted. JA XI:08265-66. The Corps also noted the scope of its review leading to adoption of the Master Manual:

> Careful consideration was given to the overall public interest and the economic, social, cultural and environmental effects throughout the development of the Selected Plan, which is the environmentally preferred plan. All applicable laws, Executive Orders, regulations and local plans were considered in evaluating the alternatives. Over 500 alternatives were addressed in four draft EISs and the FEIS. The analysis of these alternatives, and the comments and discussions they engendered are incorporated here by reference.

JA XI:08267.

Given the breadth of the Corps' investigation and the thoroughness of its presentation, it is disingenuous for Petitioners to

suggest that the Corps failed to provide a rationale for its decision. Nevertheless, Petitioners pursue that claim because they are disappointed that neither the Corps, the District Court, nor the Court of Appeals agreed with Petitioners' view about the appropriate flow regime for the Missouri River. They want this Court to undertake a *de novo* review of the record and substitute its judgment for that of the agencies.

B. The Amended BiOp Sets Forth the FWS' Rationale Both in Summary Form and in Detailed Analysis.

Section 7(a)(2) of the ESA requires only that Federal agencies avoid jeopardizing listed species or destroying or adversely modifying designated critical habitat. 16 U.S.C. § 1536(a)(2). In developing an RPA, FWS is not compelled to select one particular RPA over another. As the United States Court of Appeals for the Ninth Circuit correctly explained in the context of Colorado River dam operations:

> [U]nder the ESA, the Secretary [of the Interior] was not required to pick the first reasonable alternative the FWS came up with in formulating the RPA. The Secretary was not even required to pick the best alternative or the one that would most effectively protect the Flycatcher from jeopardy. The Secretary need only have adopted a final RPA which complied with the jeopardy standard and which could be implemented by the agency.

Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515, 523 (9th Cir. 1998) (citations omitted). Moreover, "under the ESA, the Secretary was not required to explain why he chose one RPA over another, or to justify his decision based solely on apolitical factors." *Id*. In this case, FWS selected an RPA that in its view avoided a substantive violation of the ESA. The fact that the Petitioners would have liked to have seen lower flows in one element of the RPA is irrelevant as a matter of law.

Contrary to the Petitioners' assertions, the rationale for the Amended BiOp's conclusions was stated at great length by the FWS.

The FWS noted that engineering studies produced by the Corps after the 2000 BiOp indicated that the recommended flows would not accomplish, and might well hinder, some of the habitat objectives the 2000 BiOp sought to achieve. The Amended BiOp expressly stated that FWS "accepted the Corps' results regarding the efficacy of the required RPA flow modifications to create habitat." JA IX:06633.

The FWS also undertook a detailed risk analysis of the proposed federal action for each species. JA IX:06752-96. As to the least tern, the FWS spent one and a half pages summarizing the specific information it relied on and concluded:

> After reviewing the current status of the interior least tern, the updated environmental baseline for the action area, the effects of the Corps' new proposed RPA elements, and the cumulative effects, it is the [FWS'] opinion that the 2000 Biological Opinion RPA, modified by the omission of flow changes and the addition of the proposed new RPA elements, will avoid jeopardizing the continued existence of the interior least tern.

JA IX:174-75. After almost three pages summarizing the specific information relied on, the FWS reached a similar conclusion regarding the piping plover. JA IX:06790-93. With respect to the pallid sturgeon, however, the FWS concluded that the Corps' proposal did not adequately protect the species. JA X:06794-96.

The FWS then undertook a detailed analysis of the RPA for each species. The review for the least tern and the piping plover only considered the 2000 BiOp RPA as modified by the Corps' proposals because of FWS' conclusion that these measures avoided jeopardizing these species. JA IX:06797-834. For the pallid sturgeon, however, the FWS went further, imposing four new RPA requirements expressly intended to substitute for elements of the original RPA eliminated or modified in the Corps' proposal. JA IX:06845-53. These conditions expressly included a spring rise in 2006, with modifications to that requirement based on an annual review of data collected and analyzed. JA IX:06849. The Amended

BiOp also clearly indicated that the construction of additional habitat would be necessary to comply with ESA requirements if the summer low flow were modified. JA IX:06852-53.

The record, carefully reviewed by the Court of Appeals, demonstrated that the habitat to be constructed was roughly equivalent to the habitat FWS expected would be created by the original summer low flow. Therefore, the court properly concluded that there was a rational connection between the facts in the record and the decision to eliminate the summer low flow based on, among other things, the construction of the additional habitat. 421 F.3d at 634 (Pet. App. at 22a). The court also correctly concluded that there is no requirement that every detail supporting an agency's decision be stated expressly in the summary of the agency's rationale. *Id.* at 637 (Pet. App. at 26a). As this Court has stated, it is only necessary that "the agency's path may reasonably be discerned." *Motor Vehicle Manufacturers Association*, 463 U.S. at 43, 103 S. Ct. at 2867. Here, the Eighth Circuit correctly found that FWS' path could be discerned from the Amended BiOp.

Even this brief overview of the Amended BiOp demonstrates that FWS stated a sufficient rationale for its choice of alternative RPA requirements. The Court of Appeals recognized this rationale and found it was supported by the record, nothing more. To be sure, the record also contains evidence that can be used to argue for retention of a low summer flow. In a case of this complexity involving significant biological uncertainty, it would be unusual if such evidence did not exist. Petitioners argue that this evidence means that the FWS decision was irrational, an argument rejected by both the District and Circuit Courts. As demonstrated above, FWS' conclusion and the decisions of the courts below were amply supported by the record.

III. THE STANDARD OF REVIEW APPLIED BY THE COURT OF APPEALS' DECISION CREATES NO CONFLICT.

Petitioners complain that the agencies failed to provide a discrete prose explanation of each graphic factor the agencies relied on. They claim that other circuits have imposed such a requirement, and the Eighth Circuit is in conflict with those circuits. But no decision of this or any other court, including the cases cited by Petitioners, has imposed the requirement Petitioners urge.

In some of the cases cited by the Petitioners, the court found, after a careful and searching review of the record, that there was insufficient evidence in the record to support the decision. *Pacific Coast Federation of Fishermen's Associations v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1091-93 (9th Cir. 2005) (administrative record contained no evidence to support ESA no jeopardy determination); *National Association of Home Builders v. Norton*, 340 F.3d 835, 846-52 (9th Cir. 2003) (administrative record contained no evidence to support critical factor in ESA listing decision); *W.R. Grace & Co. v. U.S. Environmental Protection Agency*, 261 F.3d 330, 340-44 (3rd Cir. 2001) (limited administrative record contained no evidence supporting standards set in clean up order); *Sierra Club v. U.S. Environmental Protection Agency*, 167 F.3d 658, 663-66 (D.C. Cir. 1999) (only evidence in record contradicted standards adopted by agency for medical waste incinerators). The court in this case, however, found that evidence in the record supported the conclusions reached in the Amended BiOp and the FEIS. These decisions do not conflict, but simply apply the same standards to vastly different records.

This group of cases cannot be construed to impose a requirement that every bit of evidence an agency relies on in making its determination must not only be found in the administrative record, but also must be repeated in the actual decision document. Such a requirement would be virtually impossible in a case, like this one, with such a voluminous record. Such a requirement also makes no sense in light of the well established principle that the reviewing court must undertake a careful and searching review of the record.

If the agency were required to recite each bit of relevant evidence in the decision document, no review of the record would be necessary.

In the remaining cases cited by Petitioners, the court found, after a careful and searching review of the record, that the agency had not articulated any explanation for the decision. *New York v. U.S. Environmental Protection Agency*, 413 F.3d 3, 33-36 (D.C. Cir. 2005) (administrative record contained no explanation how EPA can enforce requirement when its rule change does not require maintenance of data necessary to determine compliance); *JSG Trading Corp. v. U.S. Department of Agriculture*, 176 F.3d 536, 543-46 (D.C. Cir. 1999) (no justification in record of administrative proceeding charging commercial bribery to support judicial officer's adoption of a per se test inconsistent with agency's prior decisions); *Chemical Manufacturers Association v. Environmental Protection Agency*, 899 F.2d 344, 357-60 (5th Cir. 1990) (court could not discern from the administrative record the criteria used by agency to determine whether quantities of pollutants were substantial); *American Municipal Power-Ohio, Inc. v. Federal Energy Regulatory Commission*, 863 F.2d 70, 166 (D.C. Cir. 1988) (agency failed to state in rate case which of two competing standards it used in reaching decision).

The decision in *New York v. U.S. Environmental Protection Agency* is particularly relevant in this case. In addition to finding that there was no explanation for a change in the record keeping provisions of the rule at issue in that case, the court also addressed a change in the emission standards in the same rule. The EPA acknowledged that its rule was based on incomplete data and that it could not reasonably quantify the impact of this rule change. 413 F.3d at 30. Nevertheless, the court upheld the rule change, noting that the fact that "'the evidence in the record may also support other conclusions . . . [does not] prevent us from concluding [the agency] decisions were rational and supported by the record.'" *Id.* at 31 (quoting *Lead Industry Association v. EPA*, 647 F.2d 1130, 1160 (D.C. Cir. 1980)).

Thus, the D.C. Circuit and the Eighth Circuit are in accord. Both courts found the agency rationale was stated in the

administrative record with sufficient clarity. Unlike the cases cited by Petitioners, here the Eighth Circuit Court of Appeals was not faced with *post hoc* rationalizations of counsel or new evidence submitted to the trial court.[8] Its decision was based solely on the relevant decision documents and the administrative record compiled in the agency proceedings.

CONCLUSION

For the reasons stated above, the Petition should be denied.

Respectfully submitted,

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[8]The Court of Appeals specifically explained that it could not accept such reasoning. 421 F.3d at 634 (Pet. App. at 22a).